



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 3, 2005

Mr. James G. Nolan
Open Records Attorney
Comptroller of Public Accounts
P. O. Box 13528
Austin, Texas 78711-3528

OR2005-00007

Dear Mr. Nolan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 216103.

The Comptroller of Public Accounts (the "comptroller") received a request for information relating to (1) each applicant with a score higher than the requestor's test score for a Program Specialist I position; (2) the person who was hired for the position; (3) the criteria used to select the person who was hired; and (4) the requestor's test and the criteria used to score his test. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.130, and 552.137 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.¹

Section 552.103, the "litigation exception," provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the comptroller to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that raises section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App. — Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. — Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be established in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990) Id.*

You inform us that the submitted information is related to a pending lawsuit in which the requestor is the plaintiff and the comptroller is the defendant. You also state, and have provided documentation demonstrating, that the lawsuit was pending on the date of the comptroller's receipt of this request for information. Based on your representations, the submitted documentation, and our review of the submitted information, we find that section 552.103 is applicable in this instance.²

We note, however, that the submitted documents include information that the requestor already has seen or to which he has already had access. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to the litigation through discovery procedures. *See Open Records Decision No. 551 at 4-5 (1990)*. Thus, if the opposing party in the litigation has already seen or had access to information that relates to the litigation, through discovery or otherwise, there is no interest in withholding such information from the public under section 552.103. *See Open Records Decision Nos. 349 (1982), 320 (1982)*. Therefore, the submitted information that the requestor already has seen or to which he has already had access may not be withheld under section 552.103. As you claim no other exception to the disclosure of any of that information, it must be released. The comptroller may withhold the rest of the

²As we are able to make this determination, we need not address the other exceptions you claim.

submitted information at this time under section 552.103. We note that this exception is no longer applicable once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

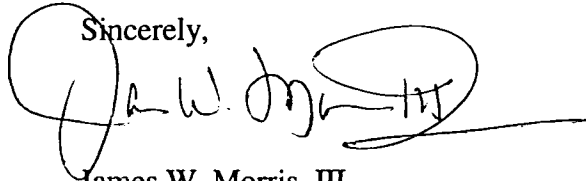
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is fluid and cursive, with a large initial "J" and a long horizontal stroke at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/krl

Ref: ID# 216103

Enc: Submitted documents

c: Mr. Anthony Wilson
9472 Valley Ranch Parkway E
Irving, Texas 75063-4901
(w/o enclosures)